Supreme Court, U.S.
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No.

In the Supreme Court of the United States

Dianna Roberts,

Petitioner,

v.

WMC Mortgage Corporation, Bank One, N.A., Fairbanks Capital Corporation,
Respondents.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

PETITION FOR WRIT OF CERTIORARI

Dianna Roberts, Pro Se
c/o 17932 N.E. Wasco
Portland, Oregon 97230
(503) 666-9121

QUESTIONS PRESENTED

In this case, the Ninth Circuit held the District Court failed to acquire subject matter jurisdiction because the plaintiff failed to give TILA rescission notice to the assignee. The questions presented are:

1. Whether the Ninth Circuit (in)correctly held, in conflict with the 5th, 7th and 11th circuits that the word creditor, as used in 15 U.S.C.§ 1602(f) means original creditor.

2. If the answer to Question one is no, the following Question: Whether creditor making an assignment, with an interest in real property, must correctly file an assignment into the system of records that provides the correct name and address of the assignee so a party can give notice of recission to an assignee under 15 U.S.C.§ 1635 and Regulation Z § 226.15.

3. If the answer to Question One is no, the following Question: Whether an assignment, with an interest in real property, be made to a National Bank that ceased to operate under that name for one year require any duty to a party seeking to rescind under the TILA.

4. If the answer to Question One is no, the following Question: Whether Oregon State Law, O.R.S. 73.0504(a), controls when a creditor files an assignment, with an interest in real property, that fails to provide correct name

an address by allowing a notice of dishonor when diligence does not enable a party to make said actual rescission due to lack of information.

5. If the answer to Question One is no, the following Question: Whether an assignee, in the form of a Pooling and Service Agreement, can be served a consumer's right to rescind by providing a copy to the Master Service WMC, original creditor, and obligated under that agreement to except documents on behalf of the Trustee, FNBC predecessor to Bank One, to accept said documents.

PARTIES TO THE PROCEEDING

All parties are listed in the caption.

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PETITION FOR A WRIT OF CERTIORARI

Dianna Roberts, Pro Se, respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit in this case.

OPINION BELOW

The Memorandum of the United States Court of Appeals for the Ninth Circuit. Unpublished. (App., 1a). Judgment was entered March 10, 2006. (App., 1b) The opinion of the district court (App., 1c) are unreported.

JURISDICTION

The judgment of the court of appeals was entered on March 10, 2006. (App., *Infra.*, 1b). A timely petition for rehearing was denied on July 22, 1999. (App., *1e*) The jurisdiction of this Court is invoked under 28 U.S.C. § 1254 (1).

STATUTORY PROVISIONS INVOLVED

The pertinent statutes and constitutional provisions are reproduced in the Appendix. The statutes involved are 15 U.S.C. §§ 1602(f), 1635,1641 (c)(f), 12 U.S.C. § 1, 27, and Regulation Z as in 12 C.F.R. 226.15, 226.2 and the Official Staff Commentary on Regulation Z by the Board of Governors of the Federal Reserve System charged with the administering Truth In Lending Act, TILA, at 15 U.S.C. § 1604(a).

STATEMENT

This case presents questions of broad practical importance

to the administration of the Truth In Lending Act (TILA), 15 U.S.C. § 1601 et seq. The Ninth Circuit effectively set aside the language of the relevant statutory provisions 15 U.S.C. §§ 1635 (a) (f) and 1641 (a)(f), C.F.R.226 and interpretations of a regulation by the Board of Governors of the Federal Reserve System who is administering TILA. This case also deal with a question concerning a national bank operating under a name that ceased to exist and having no authority, 12 U.S.C. § 27 by the Comptroller of Currency, 12 U.S.C. § 1.

1. Statutory Background

The Truth in Lending Act ("TILA") was initially passed in 1968, to assure a meaningful disclosure of credit terms so that the consumer will be able to compare more readily the various credit terms available to them and avoid the uninformed use of credit. 15 U.S.C. § 1601 (a). As a remedial statue, TILA is to be construed liberally in favor of the consumer. *Semar v. Platte Valley Fed. Sav. & Loan Ass'n.*, 791 F. 2d 699 (9th Cir. 1986).

TILA requires creditors to disclose to consumers detailed information about the terms of transactions and provides civil remedies, including statutory and actual damages, for defects in disclosure. 15 U.S.C. § 1601, et seq. In addition to allowing consumers to recover damages for disclosure violation, in certain transactions when material disclosures are defective TILA also provides the consumer relief from the lender's security interest, and a means of recouping everything paid by the consumer. This device is Truth in Lending rescission. For three days following consummation, owners and borrowers have an unconditional right to rescind non-purchase money loans secured by their principal residence. 15 U.S.C. § 1635 (a). Where material disclosure or notice of the borrower's right to rescind are not given, or given inaccurately, the right is extended beyond the initial three day period, for up to a maximum of three years from consummation

of the transaction. 15 U.S.C §1635(a),(f).

Under TILA, a borrower generally has three days within which to rescind a transaction. 15 U.S.C. § 1635 (a); C.F.R. § 226.23 (b)(1). If the creditor fails to provide the borrower with two (2) notices of her rescission rights, the right to rescind can extends until three years from the consummation of the transaction. 15 U.S.C. § 1635 (f); C.F.R. § 226.23(a)(3). The right to rescind a transaction for violations of TILA is not indefinite. The TILA does not permit a federal right after the three-year period of § 1635 (f). *Beach v. Ocwen Fed. Bank*, 523 U.S. 410, 419,118 S.Ct. 1408, 1413 (1998).

Rescission under the Truth in Lending Act is dramatically different from common law rescission as explained in *Williams v. Homestake Mortgage Co.*, 968 F. 2d 1137, 1140 (11th Cir.1992). TILA allows a borrower to rescind a consumer loan secured by the borrower's primary dwelling. 15 U.S.C. § 1635 (a). Technical or minor violations of TILA or Reg Z, as well as major violations, impose liability on the creditor and entitle the borrower to rescind. *Semar*,791 F. 2d 699, 701 (9th Cir. 1986). Strict compliance with the statutes is required to ensure consumer protection. Id. Minor violations are not forgiven, even if the consumer was not mislead and provided with correct disclosure of crucial terms. Id. (citing *Huff v. Steward-Gwinn Furniture Co.*, 713 F. 2d 67, 69 (4th Cir. 1983)). Rescission is the appropriate remedy for violations of TILA. *Semar*, 791 F. 2d at 704.

The Board of Governors of the Federal Reserve System ("the Fed") is the agency charged with administering TILA, 15 U.S.C.A. §§ 1602(a) and 1604(a), and has adopted extensive regulations implementing TILA, 12 C.F.R. Part 226 (2003), all of which it calls "Regulation Z." *See* 12 C.F.R. § 226.1(a). When the agency charged with enforcing a statute has promulgated a regulation that adopts a permissible construction of the statute, the courts must defer to that interpretation and not impose their own.

Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc., 467 U.S. 837, 842-44 (1984). Furthermore, the Supreme Court has indicated this requirement is especially strong in the context of the TILA and Regulation Z, where even official staff interpretations of the statute and regulation should control unless shown to be irrational. *Ford Motor Credit Co. v. Milhollin*, 444 U.S. 555, 559-70 (1980)

See also *Anderson Brothers Ford v. Valencia*, 452 U.S. 205, 219 (1981) (citing *Milhollin*, Court indicated that absent "obvious repugnance" to statute, Fed's regulation implementing TILA and interpretation of that regulation should be accepted by courts) and *Davison v. Bank One Home Loan Services*, 2003 WL 124542, at *5 (D. Kan. 2003) (there existed unmistakable congressional decision to treat administrative rule making and interpretation under TILA as authoritative).

The Supreme Court stated that: "Unless demonstrably irrational, Federal Reserve Board staff opinions construing [TILA or Regulation Z] should be dispositive." *Milhollin, id.* at 565-66. See also 444 U.S. at 562-70 (when the TILA and Regulation Z are silent on an issue, courts cannot even substitute their views for views expressed by the staff of the Fed). See also *Anderson Brothers Ford v. Valencia*, 452 U.S. 205, 211-23 (1981) (even Fed staff interpretation not yet adopted by Federal Reserve Board was entitled to deference from courts).

Lower courts have been admonished by the Supreme Court in that:

> When a court reviews an agency's construction of the statute which it administers, . . . [and where a] court determines Congress has not directly addressed the precise question at issue, the court does not simply impose its own construction of the statute, as would be necessary in the absence

> of an administrative interpretation. Rather, if the statute is silent or ambiguous with respect to the specific issue, the question for the court is whether the agency's answer is based on a permissible construction of the statute.

Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc., 467 U.S. 837, 842-43 (1984). Another circuit has held that "in TILA actions, we defer to the regulations interpreting the Act." Begala v. *PNC Bank, Ohio, National Ass'n*, 163 F.3d 948, 950 (6th Cir. 1998).

B. Factual Background

On August 26, 1998, Plaintiff entered into a consumer mortgage refinance transaction with WMC Mortgage Corporation, hereinafter WMC, in which the extended consumer credit that was subject to a finance charge and was initially payable to WMC Mortgage Corporation. The mortgage was a consumer credit transaction within the meaning of TILA, 15 U.S.C. § 1602 and Regulation Z § 226.2.The consumer credit transaction took place at the office of Chicago Title Insurance Company of Oregon at the address of 10001 S.E. Sunnyside Road, Suite 110, Clackamas, Oregon on August 26, 1998.

In connection with this consumer credit transaction, WMC retained a security interest in 17930 - 17932 N.E. Wasco Street, Portland, Oregon, which is the principal dwelling of the Petitioner. On September 25, 2000, WMC recorded, in the county records, a flawed Assignment, dated June 16, 2000, of the loan to the First National Bank of Chicago ("FNBC"), which had previously changed its name to Bank One effective September 13, 1999. This Assignment misspelled Dianna Roberts' name as "DIANA ROBERTS", omitted the assignee's address, and gave the assignee's old name FNBC along with omitting Bank One's name as successor trustee. (App., 1n).

In the week prior to August 6, 2001, the Plaintiff made a diligent inquiry into the system of records with the assistance of the county clerk in Multnomah County, State of Oregon, to locate parties to give notice of rescission and WMC is the only party appearing as having an interest in the property relating to the Deed of Trust found in that search.

On or about August 6, 2001, the Petitioner rescinded the transaction by sending a Notice of Rescission to the legal counsel for WMC Mortgage Corporation, Michael Mayer, 6320 Canoga Avenue, Woodland Hills, California. WMC, whose name appears as the original creditor in the system of county records, was later to become a Master Servicer under a pooling and servicing agreement which named the First National Bank of Chicago as trustee. WMC as Master Servicer had the power to act in the trustee's name. When FNBC merged into Bank One, Bank One became successor trustee under the agreement, and successor beneficiary under the Deed of Trust.

On April 22, 2002 exercised her remedy under Oregon Law and had a notarial protest created as a result of Respondent's failure to recognize her notice of rescission and the protest was delivered to the following entities: Northwest Trustee Services LLC, WMC, Bank One N.A., Regional Trustee Services Corporation, National Process Services Inc., Routh, Crabtree & Fennell and Loan Services Center, a.k.a. Fairbanks Capital. (See App., 1o). The caption of that protest stated: "PROTEST FOR NON-ACCEPTANCE OF NOTICE OF DECEMBER 13, 2001, TRUSTEE'S NOTICE OF SALE AND DEED OF TRUST, RECORDED IN THE COUNTY OF MULTNOMAH, OREGON, RECORDING NUMBER 98159385 DUE TO RECISSION".

The Respondents continued to not recognize Petitioners' notice of rescission so the Petitioner brought this action by filing her verified complaint.

A. Proceedings Below

Petitioner filed her verified complaint in this court case in the Federal District of Oregon on April 17, 2002. Both Petitioner and Respondent's filled for their respective summary judgments. On February 4, 2004 trial judge Anna J. Brown issued her Opinion and Order. (App., 1c). The trial court judge denied Petitioners motion of rescission and granted her motion for violations of FDCPA against Respondent Fairbanks and deny the remainder of her claims. The Trial Judge granted in part and denied in part the Respondents motion on their claims. Respondent Bank One was denied judicial foreclosure and did not appeal. (Bank One after losing its claim of judicial foreclosure is proceeding with a non judicial foreclosure. Petitioner has filed two motions before this Court for emergency stay and to extend injunction pending petition for certiorari.) On June 15, 2006 the Petitioner filed her Notice of Appeal. That notice of appeal was entered into the record on June 24, 2006 in the Ninth Circuit Court of Appeals. On November 23, 2004, the Petitioner's emergency motion for injunction pending appeal was granted. On December 30, 2004 the Petitioner filed an Opening Brief. On January 12, 2005 Respondents filed a Response Brief, abandoning all issues except the jurisdictional issue of whether Plaintiff/Petitioner had notified "the creditor." On January 25, 2005, Petitioner filed a Reply Brief. On February 22, 2005 Petitioner timely moved the Ninth Circuit to issue an Order to Strike Appellee's Response Brief for failure to comply with FRCP 25(d)(1)(2) and (3). On February 25, 2005 this motion was denied. On November 2, 2006 Petitioner's case was ordered submitted without oral argument on November 18, 2006. On March 10, 2006 a unpublished Memorandum was issued. (App., 1a).On March 10, 2006 a judgment was entered into the Ninth Circuit Court of Appeals. Petitioner filed a petition for publication and was denied on May 16, 2006. On May 23, 2006 a joint petition for panel rehearing and petition for rehearing en banc was denied on May 24, 2006. Therefore, the 90 days for

Petition for Writ of Certiorari began to run on May 24, 2006. On July 18, 2006, trial court, Judge Anna J. Brown, issued an order dismissing Plaintiff's rescission claim for lack of subject matter jurisdiction.

REASONS FOR GRANTING PETITION

The Ninth Circuit has changed the meaning of the word "creditor" affecting who must be served a notice of consumer's election to rescind under 15 U.S.C. §§ 1635 and 1641 and disregarded Regulation Z with their staff interpretations. The Ninth Circuit is in conflict with 5th, 7th and 11th Circuits. The Ninth Circuit did not review argument on whether equitable tolling and or equitable estoppel applied in Petitioners case. This Court's review is warranted to resolve the circuit conflict, conflict with statutory construction of the TILA, conflict with Regulation Z and to forestall any further distortion of the TILA.

I. THIS COURT SHOULD RESOLVE THE CONFLICT AMONG THE CIRCUITS OVER THE MEANING OF "CREDITOR" IN 15 U.S.C. § 1635

This case is unprecedented in that no other TILA rescission case in the 9th Circuit features: (1) a Petitioner who notified WMC, the original lender and Master Servicer and party to Pooling and Service agreement in an assignment, then was accused of failing to notify "the creditor;" (2) a Petitioner who was unable to find the recorded Assignment due to acts of the lender; (3) a recorded assignment which omits the mailing address of the assignee; (4) a recorded assignment which mis-names the assignee; (5) a recorded assignment which mis-names the Petitioner.

A. The Circuits Are Divided on the Meaning Of The Word Creditor.

The word creditor means the original lender in the statute describing the rescission process. 15 U.S.C. 1635(a) states:

> ... the obligor shall have the right to rescind the transaction ... by notifying **the creditor**, in accordance with regulations of the Board, of his intention to do so. **The creditor** shall clearly and conspicuously disclose, in accordance with regulations of the Board, to any obligor in a transaction subject to this section the rights of the obligor under this section. **The creditor** shall also provide, in accordance with regulations of the Board, appropriate forms for the obligor to exercise his right to rescind any transaction subject to this section. (Emphasis added).

The same statute which directs the consumer to notify "the creditor" also imposes disclosure duties on "the creditor." Clearly, therefore, Congress intended "the creditor" to mean the original lender. Congress enacted TILSRA (effective in 1982) and amended the definition of "creditor". As a result, TILA presently defines "creditor" in 15 U.S.C. § 1602(f) as

> a person who both (1) regularly extends, whether in connection with loans, sales of property or services or otherwise, consumer credit which is payable by agreement in more than four installments or for which the payment of a finance charge is or may be required, and (2) is the person to whom the debt arising from the consumer credit transaction is **initially payable** on the face of the evidence of indebtedness or, if there is no such evidence of indebtedness, by agreement. (Emphasis added).

The legislative history of TILSRA reflects that Congress sought to simplify the definition of "creditor." *See* S. Rep. No. 96-73, 1979 WL 10376 at *15 (1979) ("TILSRA simplified definition of "creditor".). When it enacted TILA, Congress "delegated expansive authority to the Federal Reserve Board to elaborate and expand the legal framework governing commerce in credit". *Fairley v. Turan-Foley Imports, Inc.*, 65 F.3d at 479 (5th Cir. 1995) (quoting *Milhollin, id.*, at 559-60).

To implement TILA, the FRB promulgated "Regulation Z", located at 12 C.F.R. § 226. *See id.* Regulation Z defines a "creditor" as "[a] person (A) who regularly extends consumer credit ..., and (B) to whom the obligation is initially payable, either on the face of the note or contract, or by agreement when there is no note or contract". 12 C.F.R. § 226.2(a)(17)(i).

In *Milhollin, id.*, at 565-66, the Supreme Court stated that, "[u]nless demonstrably irrational, Federal Reserve Board staff opinions construing [TILA or Regulation Z] should be dispositive". The staff interpretation is not demonstrably irrational. *See Kinzel v. Southview Chevrolet Co.*, 892 F. Supp. 1211, 1216 (D. Minn. 1995) (staff interpretation of "creditor" is rational, "as it simply restates the congressional intent to eliminate an ambiguity in the statute prior to October, 1982").

Regulation Z also contains an official FRB staff interpretation regarding the distinction between "creditors" and "assignees" in 12 C.F.R. pt. 226, supp. I, subpt. A, cmt. 2(a)(17)(i)(2) as follows:

> **If an obligation is initially payable to one person, that person is the creditor** even if the obligation by its terms is simultaneously assigned to another person. For example:
>
> *An auto dealer and a bank have a business

> relationship in which the bank supplies the dealer with credit sale contracts that are initially made payable to the dealer and provide for immediate assignment of the obligation to the bank. The dealer and purchaser execute the contract only after the bank approves the creditworthiness of the purchaser. Because the obligation is initially payable on its face to the dealer, the dealer is the only creditor in the transaction.

(Emphasis added.) See also *Ellis v. General Motors Acceptance Corp.*, 160 F.3d 703, 705-08 (11th Cir. 1998) (treating GMAC as assignee, even though contract was simultaneously assigned to it by automobile dealer); *Taylor v. Quality Hyundai, Inc.*, 150 F.3d 689 (7th Cir. 1998), *cert. denied*, 119 S. Ct. 1032 (1999), *Riviere v. Banner Chevrolet Inc.*, 184 F.3. 457 (5th Cir.1999) (treating automobile dealer as "creditor" and financing companies as assignees).

The Petitioner served written notice to the original creditor WMC on August 6, 2001 which was within the three-year period. With Petitioners' notice of rescission, subject matter jurisdiction was acquired. The existence of subject matter jurisdiction is a question of law reviewed de novo. *A-Z international v. Phillips*, 323 F. 3d 1141, 1145 (9th Cir. 2003). The Ninth Circuit ruling is in conflict with 5th, 7th and 11th circuits. This Court should resolve the conflict.

B. The Meaning Of Creditor In TILA Is A Recurring Question Of Federal Law On Which Uniformity Is Important

The rescission process was intended to be self-enforcing and able to be completed without the necessity of going to court. With thousands of home loans being made daily, the question of

who the creditor is, who must be provided a notice of rescission, is very important.

The Ninth Circuit held that providing notice to a servicing agent of a note and trust deed is insufficient to provide the requisite notice to the present holder in *Miguel v. Country Funding Corporation*, 309 F. 3d 1161, 1164-65 (9th Cir2002). In *Miguel*, the original lender was Alliance, and the Bank of New York was the assignee. Neither of them received notice of rescission. Therefore, the *Miguel* court never had to decide which one of them was "the creditor" of 15 U.S.C. 1635(a),(b) and 12 C.F.R. 226.2 (17), who must be given notice of rescission.

The Supreme Court declined to review *Miguel*. It is unknown whether the *Miguel* petition for certiorari raised any of the issues that Petitioner raises her petition. The factual differences between *Miguel* and the instant case are three: First, Ms. Miguel notified neither the current creditor (the assignee) nor the original creditor. Here, Petitioner notified the original creditor. Second, in the instant case an agreement between the servicer (Fairbanks) and the assignee (FNBC / Bank One) was in evidence, showing that the servicer had a contractual duty to notify the assignee. FNBC and WMC where parties to the agreement that formed the pooling and service agreed and that WMC as Master Servicer, having the authority to act as trustee, would notify FNBC (or it's successor Bank One) of any "representations ... which materially and adversely affects the interests of the ... Mortgage Loan" and any "instruments of ... cancellation." (App. 1p). Third, Petitioner made diligent efforts with the help of the clerk to locate any Assignments in the county records, and found none.

Petitioner sent a Notice of Rescission to all parties she could locate.

Due to the fact that it has become difficult to understand whom to serve with notice of rescission due to the court cases of *Miguel v. Country Funding Corp.*, 309 F. 3d 1161 (9th Cir. 2002) and *Yamamoto v. Bank of New York*, 329 F. 3d 1167 (9th Cir. 2003), various assignments (some without name and address) the Board of Governors of the Federal Reserve System reacted and clarified in Amendments to the Official Staff Commentary On Regulation Z - Truth in Lending (May 2004) to make the rescission process easier when the consumer was not provided a name and address. The Board of Governors can only write and amend rules under the authority granted by Congress to "elaborate and expand" regulations concerning credit. See *Milhollin, id.* at 559-60. The Board of Governors can not go against the legislative intent of Congress. When the agency charged with enforcing a statute has promulgated a regulation that adopts a permissible construction of the statute, the courts must defer to that interpretation and not impose their own. *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 842-44 (1984). The legislative intent of Congress was to provide a simple method of service of notice of rescission to the original creditor and avoid numerous court actions in which trained lawyers have a problem locating an assignee to be served based upon rulings by the Ninth Circuit.

The Ninth Circuit has not deferred to the promulgated rules and staff comments but imposed its own interpretations. The Petitioner, as well as many other consumers, live in the Ninth Circuit which does not provide the same remedies allowed in other circuits. Petitioners' notice of rescission did acquire subject matter jurisdiction and she should be allowed to pursue her remedies. See *A-Z International, id.* The conflict among the circuits is ripe for resolution and because the scope of the TILA with its right of rescission provision being an important and recurring question as to which there should be a uniform national rule, further review is warranted.

C. The Ninth Circuit Violated The Principle Of Statutory Construction In Allowing That An Assignee Mandatorily Must Be Provided A Notice To Rescind Under 15 U.S.C. § 1641 (c)

Review by this Court is appropriate for the additional reason that the Ninth Circuit exacerbated the error in limiting the plain language of the TILA provisions. This decision flies in the face of this Court's modern jurisprudence of statutory construction. The Ninth Circuit failed to consider the statutory context and legislative history of TILA.

15 U.S.C.§ 1641 (c) states:

(c) Right of rescission by consumer unaffected

Any consumer who has the right to rescind a transaction under section 1935 of this title may rescind the transaction as against any assignee of the obligation. (Emphasis added.)

In reading the above section it is noted that it relates to 15 U.S.C. § 1935, the section defining creditor, and the use of the word "may" in context of the assignee. Nothing in 1641 (c) requires the consumer to rescind the transaction against the assignee. Undefined statutory terms must bear their "ordinary, contemporary, common meaning." *Walters v. Metropolitan Educational Enterprises*, 519 U.S. 202,207 (1997). "[T]he law uses familiar legal expressions in their familiar legal sense. *Bradley v. United States*, 410 U.S. 605, 609 (1973) (quoting *Henry v. United States*, 251 U.S. 393, 395 (1920) (Holmes, J.)). The common meaning of "may" will not be treated as a word of command or duty. There is no duty to give notice of rescission to the assignee but a consumer may. See *United States v. Ron Pair Enterprises, Inc.*, 489 U.S. 235, 241 (1989) ([W]here, as here, the

statute's language is plain, 'the sole function of the court is to enforce it according to the terms'), quoting *Caminetti v. United States*, 242 U.S. 470, 485 (1917).

When providing for rescission against an assignee, neither Congress nor the Federal Reserve Board ever specified that "the assignee" must be notified – only "the creditor." Neither body ever redefined "the creditor" to include an assignee. The definition of "creditor" in 15 U.S.C. § 1602(f)(2) controls 15 U.S.C. § 1641. Clearly, when rescinding against an assignee, the consumer must notify "the person to whom the debt arising from the consumer credit transaction is initially payable."

If Congress had intended the term "creditor" to include assignees, it would have included such a provision in the definition, or said so in Section 1641(c). The term "creditor" does not include assignees. Therefore, "the creditor" who must be notified is the original lender (in the instant case, WMC) and not the assignee (Bank One). Neither the above statute nor Regulation Z specifies whom the consumer must notify in order to rescind "as against [an] assignee." Petitioners' notice of rescission did acquire subject matter jurisdiction. See *A-Z International, id.* Review by this Court is warranted to remedy promptly the gross distortion of the TILA by the Ninth Circuit.

II. THE NINTH CIRCUIT ERRED WHEN IT ACCEPTED AN ASSIGNMENT WITHOUT THE CORRECT NAME AND ADDRESS.

The trial court and the Court of Appeals both relied upon a public recording filed on September 25, 2000, WMC recorded, in the county records, a flawed Assignment, dated June 16, 2000, of the loan to the First National Bank of Chicago ("FNBC"), which had previously changed its name to Bank One effective September 13, 1999. This Assignment misspelled Dianna

Roberts' name as "DIANA ROBERTS", omitted the assignee's address, and gave the assignee's old name FNBC instead of the correct name Bank One or had Bank One successor to FNBC. (App., 1n).

State law provisions are preempted to the extent that they contradict the requirements in the following chapters of the TILA and the implementing sections of Regulation Z: When no address is provided the Petitioner was left with only state law to preserve her remedies.

Since there was no known address, under Oregon law, excused presentment notice of dishonor is allowed when reasonable diligence does not enable a party to make said presentment. O.R.S. 73.0504(a). On April 22, 2002 exercised her remedy under Oregon Law and had a notarial protest created and had to be delivered to the following entities: Northwest Trustee Services LLC, WMC, Bank One N.A., Regional Trustee Services Corporation, National Process Services Inc., Routh, Crabtree & Fennell and Loan Services Center, a.k.a. Fairbanks Capital.

A recording of an assignment in instrument is not enough to perfect and Bankruptcy courts have followed the uniform commercial code. See *In Re investors & Lenders Ltd.*, 165 B.R. 389 (Bkrtcy. D. N.J. 1994). Under the uniform commercial code, the only notice sufficient to inform all interest parties that a security interest in instruments has been perfected is actual possession by the secured party, his agent or bailee. Federal Circuit Courts have ruled that the only way to prove the perfection of any security is by the actual possession of the security. See *Matter of Staff Mortgage & Inv. Corp.*, 550 F. 2d 128 (9th Cir. 1977).

The underlying policy behind perfection by possession is that possession of instrument by a third party, coupled with the owner's lack of possession, alerts prospective creditors that

ownership rights may be restricted or encumbered. *In re Copeland*, 531 F. 2d 1195, 1204 (3rd Cir. 1976); See *In re Staff Mortgage & Inv. Corp.*, supra; *Kirby v. Palos Verdes Escrow Co.*, 183 Cal. App. 3d 57, 227 Cal. Rpt. 785 (Cal. App. Dist. 1 - 1992).

The party claiming real property ownership has the burden of affirmatively proving ownership. *Darling v. Christensen*, 166 Or. 17, 25-26, 109 P. 2d 585 (1941). Oregon recognizes, for purpose of public policy, that public records should generally be available to members of the public for their own personal purposes. *Handy v. Beck*, 282 Or. 653, 657-658, 581 P. 2d 68 (1978). Respondent Bank One bases its claim on a document captioned "ASSIGNMENT OF DEED OF TRUST" (App.,1n) which shows assignment to another party, no address provided and a document captioned "APPOINTMENT OF SUCCESSOR TRUSTEE" (App., 1q) which was allegedly filed for Bank One by attorney in fact Fairbanks Capital Corporation. (Fairbanks Capital Corporation is the only party to file a Proof of Claim into a bankruptcy court filed earlier by the Petitioner. Respondents did not file a Proof of Claim.) Bank One will not admit to the document being genuine (App., 1r) and it contains no address for Bank One or Fairbanks. Bank One admits there is no 'relationship' between the Respondent Bank One and Fairbanks. (App.,1r).

The assignment (App., 1n) states it was for 'valuable consideration" that WMC assigned its interest to FNBC as trustee. However, Respondent WMC has stated that it did not receive any consideration from FNBC. (App., 1v). Respondent Bank One stated that the trustee, FNBC, did not provide any consideration for the assignment but that any consideration would have been "provided" by another entity on or about September 1, 1998 which is prior to the recording of the original trust deed into county records. (App., 1w). The deed was assigned prior to recording the first deed and Respondent WMC waited until

September of 2000, two years later, to file the assignment which did not have Respondents Bank One's name as successor to FNBC. (App., 1n).

This assignment did not provide a correct name and address, thereby failing to give notice to the consumer of the identity and address of the assignee. In addition, this assignment did not spell the Petitioners name correctly into a system of records which requires the correct name to locate any recording under the system set up by the clerk of county records. Unlike certain consumer transactions, this consumer transaction involved an interest in real property, therefore it was controlled by the Statute of Frauds. A written instrument concerning the Petitioner may have been filed but was not filed correctly. Petitioner, with the aid of the clerk of records, did a search and found no assignment under her name thereby relieving her of any duty to provide notice of rescission to any assignee.

Petitioner has a right to rely on information to provide in these public recordings. **Where required information not stated directly in notice could be readily determined from information given, notice was insufficient.** (Emphasis added) *Ho v. Presbyterian Church of Lauerlhust*, 116 Or. App. 115, 840 P. 2d 1340 (1992), Sup. Ct. review denied, 315 Or. 311 (1993); *Carroll v. Newcomb*, 132 Or. App. 526, 888 P. 2d 1062 (1995). There is no way Petitioner could determine from information recorded in public records to give any written notice to The First National Bank of Chicago or Bank One when no address was provided. Due to the fact no address, incorrect name of assignee and Petitioner's misspelled name was not provided, there was no duty placed upon the Petitioner to give notice of rescission to Bank One.

Furthermore, Petitioner gave notice of rescission to WMC, original lender and party to the Pooling and Service Agreement of

which FNBC is the trustee. WMC is an agent (Master Servicer) of FNBC and of its successor Bank One trustee. Oregon holds to the principle that notice to an agent is notice to principal (Bank One). See *State v. Burss*, 113 Or. App. 494 (1992). Petitioner gave notice of rescission to WMC, original creditor and Master Servicer as a party to a pooling and service agreement, which made the assignment and had authority under the terms of the pooling and service agreement to receive the notice of rescission, on August 6, 2001 within the three year statute of limitations thereby acquiring subject matter jurisdiction.

This Court's review is warranted to resolve circuit conflict, conflict with Regulation Z and forestall further distortion of the TILA.

III. THE NINTH CIRCUIT ERRED WHEN IT ACCEPTED AN ASSIGNMENT MADE TO A NATIONAL BANK THAT CEASED TO EXIST FOR ONE YEAR.

The Respondent Bank One is a national bank under the authority of the Comptroller of Currency. Congress allowed for a national bank in Title 12 and the Comptroller office at 12 U.S.C. § 1. The issue is whether Bank One's predecessor, FNBC, operated outside its authority (12 U.S.C. § 27) by continuing to conduct business more than year after a name change to Bank One.

The assignment made to FNBC was entered into public records by WMC on September 25, 2000. According to the Comptroller of Currency, FNBC became Bank One N.A. on September 13, 1999. (App., 1x) WMC and FNBC were parties to a pooling and service agreement. (App., 1s). Bank One's name should have appeared on that assignment since it was the successor to FNBC. For FNBC's name to appear on that document the assignment had to be made before September 13, 1999.

The authority of a National Bank is what Congress has granted. "The measure of their powers is the statutory grant; and powers not conferred by Congress are denied. For the act under which national banks are organized constitutes a complete system for their government." *Texas & Pac. Ry. Co. v. Pottorff*, 54 S.Ct. 416, 417; 291 US 245; 78 L.Ed. 777.

For a valid assignment to be made by WMC after September 13, 1999, Bank One's name (not FNBC's name) would have had to appear on that assignment. Even for WMC to make an assignment before September of 1999 and wait to 2000 to record that assignment, WMC, as a party to the pooling and service agreement, had a duty to at least put Bank One's name as successor to FNBC. "The court ... concludes that a contract of a corporation that is ultra vires, or outside the object of its created as defined in the law of its organization, is wholly void and of no legal effect." *Centra Transp. Co. v. Pullman's Palace Car Co.* 139 U.S. 24, 11 S.Ct. 478.

WMC is a party to the pooling and servicing agreement, which has and runs a trust office in the FNBC building, now Bank One building, in Chicago. WMC had knowledge that FNBC changed its name to Bank One, and still recorded an assignment without naming Bank One as successor to FNBC on that document. The recording of this assignment prejudiced the Petitioner in her attempt to locate information from public records which should have been recorded correctly, since under the statute of frauds an interest in real property must be in writing and compliant with state law before being recorded. Since Bank One had no authority to operate under the name of FNBC, the assignment was void; WMC was still the creditor; and the Petitioner had no duty to provide a notice of rescission to FNBC or to its successor Bank One.

This Court's review is warranted to forestall distortion of the National Bank Act and other authorities under Title 12.

IV. THE NINTH CIRCUIT ERRED BY NOT ACCEPTING OREGON LAW REMEDIES TO DISHONOR WHEN NO NAME OR ADDRESS IS PROVIDED IN DOCUMENT UNDER EQUITABLE TOLLING AND EQUITABLE TOLLING AND ESTOPPEL AS IT RELATES CONCEALMENT AND THEIR EFFECTS ON THE STATUTE OF LIMITATIONS UNDER TILA.

This Court should consider whether the lack of the correct name of an assignee or their omitted address affects the rescission statute of limitations of the TILA. When Congress enacts statutes creating rights or benefits, it can impose time limits on their availability. These time limits can either completely extinguish the right or bar the remedy for enforcement. Courts have ruled that section 1635(f) is an absolute limitation on rescission actions thereby creating a statute of repose. However, there are situations in which that is not true.

Courts continue to have jurisdiction under their discretion to consider particular circumstances affecting the ability of a party seeking review to comply with the time limits, which can be tolled when principles of equity render their rigid application unfair. See *Zipes v. Trans World Airlines, Inc.*, 455 U.S. 385, 398 (1982); *Holmberg v. Armbrecht*, 327 U.S. 392, 295-96 (1946).

Both equitable tolling and equitable estoppel can be used to "stop a limitations period from continuing to run after it has already begun to run". See *Gardenhire v. IRS*, 220 B.R. 376,382 (B.A.P. 9th Cir. 1998), rev'd on other grounds, 209 F. 3d 1145 (9th Cir. 2000). But while tolling "focuses on the plaintiff's excusable ignorance of the limitations period and lack of prejudice to the defendant," estoppel "focuses on the actions of the defendant."

Naton v. Bank of California, 649 F. 2d 691, 696 (9th Cir. 1981); see also *Lehman v. United States*, 154 F. 3d 1010, 1015-17 (9th Cir. 1998) (discussing both theories), cert. denied, 526 U.S. 1040 (1999)("equitable tolling applies when the plaintiff is unaware of his cause of action, while equitable estoppel applies when the plaintiff who knows of his cause of action reasonably relies on the defendant's statements or conduct in failing to bring suit").

Congress through TILA sought to protect consumers' choice through full disclosure and to guard against the divergent and at times fraudulent practices stemming from the uninformed use of credit. See *Mouring v. Family Publication Services, Inc.*, 411 U.S. 356, 363-4, 36 L. Ed. 2d 318, 93 S. Ct. 1652 (1973) (citing H.R. Rep. No. 1040, 90th Cong., 1st Sess., 13 n. 18 (1967); S. Rep. No. 392, 90th Cong., 1st Sess. 1-2 n.19 (1967)). The courts have construed TILA as a remedial statute, interpreting it liberally for the consumer. *Riggs v. Government Employees Financial Corp.*, 623 F. 2d 68, 70-71 (9th Cir. 1980). As the Sixth Circuit noted, "only if Congress clearly manifests its intent to limit the federal court's jurisdiction will it be precluded from addressing allegations of fraudulent concealment which by their very nature, if true, serve to make compliance with the limitation period imposed by Congress an impossibility." *Jones v. TransOhio Saving Ass'n.*, 747 F. 2d at 1041.

Equitable estoppel and equitable tolling are two distinct concepts often blurred by inconsistent use of the terminology. "Our court has occasionally used the term equitable tolling as a blanket phrase which included equitable estoppel as well." *Dring v. McDonnell Douglas Corp.*, 58 F. 3d 1323, 1328 (8th Cir. 1995). As a rule, however, '[e]quitable tolling is appropriate when the plaintiff, despite all due diligence, is unable to obtain vital information bearing on the existence of his claim." *Id.* (quoting *Chakonas v. City of Chicago*, 42 F. 3d 1132, 1135 (7th Cir. 1994)). Equitable tolling does not require any misconduct on the part of

the defendant. *Bell v. Fowler*, 99 F. 3d 262, 266 n.2 (8th Cir. 1996).

The Petitioner raised the issue of equitable tolling and estoppel in her response to Respondent Bank One's motion for summary judgment and her cross motion for summary judgment. The trial court judge did not speak to this in any detail or grant Respondent Bank One's claim that it is entitled to summary judgment, on the grounds that Plaintiff failed to provide Bank One with notice of her intent to rescind the transaction within the three-year time period. (App., 1c). The trial judge went into the subject matter of the TILA, ruled that Petitioner received two copies and denied Petitioner's rescission claim. That ruling was the center point of Petitioner's appeal to the Ninth Circuit.

For the trial court to go forward with the issue of jurisdiction being raised, it would have dealt with the question first at summary judgment before going forward on any other point. The Petitioner raised the issue of equitable tolling and estoppel at summary judgment as well with the Ninth Circuit over the issue of subject matter jurisdiction.

On April 12, 2002, the Plaintiff had requested a notarial protest and was granted same concerning the Deed of Trust. (App., 1t). Copies of the protest were sent to all parties and/or agents having and/or showing an interest in the Deed of Trust. Notices were sent to Northwest Trustee Services, LLC., WMC, Bank One, Regional Trustee Services Corporation, Nationwide Process Service, Inc., Routh, Crabtree, Fennell, and Loan Services Center, a.k.a Fairbanks Capital. (App., 1t).

The Respondent Bank One did receive notice or Petitioner's right to rescind in April of 2002. Respondent Bank One would have received notice sooner had any assignment been located, with Respondent's name and address appearing upon it.

Yes, it is past the statute of limitations, but equitable estoppel does not require affirmative misconduct on behalf of the opposing party; rather, all one need show is that by the exercise of reasonable diligence, the proponent of tolling could not have discovered essential information bearing on the claim.

Respondent WMC made the assignment to FNBC as trustee under a pooling and service agreement. FNBC, predecessor to Respondent Bank One, and WMC were parties to the pooling agreement. WMC managed the trust office in the FNBC building, later to become Bank One building. WMC filed an assignment omitting the address of the assignee and did not provide the correct name of the assignee. After the assignment WMC continued as the Master Servicer of this pooling agreement. If a party is in privity, or principal-agent relationship with a defendant, defendant's approval of the concealment may be sufficient to toll the statute. Unless Congress states otherwise, equitable tolling should be read into every federal statute of limitations. *Holmberg,* 327 U.S. at 394-96.

Since there was no known address, under Oregon law, excused presentment notice of dishonor is allowed when reasonable diligence does not enable a party to make said presentment. O.R.S. 73.0504(a). Under Reg. Z, state law determines whether delivery of the notification of rescission is made. The Amendments to the Official Staff Commentary on Regulation Z Truth in Lending states:(App., 1m)

> 2. *Comment 15(a)(2)-1 is amended by adding two sentences at the end to read as follows:*
>
> * * * Where the creditor fails to provide the consumer with a designated address for sending the notification of rescission, delivery of the notification to the person or address to which the consumer has been directed to send payments

> constitutes delivery to the creditor or assignee. **State law determines** whether delivery of the notification to a third party other than the person to whom payments are made is delivery to the creditor or assignee, in the case **where the creditor fails to designate an address for sending the notification of rescission.** (Emphasis added).
>
> * * *
>
> 5. *Comment 23(a)(2)-1 is amended by adding two sentences at the end to read as follows:*
>
> * * * Where the creditor fails to provide the consumer with a designated address for sending the notification of rescission, delivering notification to the person or address to which the consumer has been directed to send payments constitutes delivery to the creditor or assignee. **State law determines whether delivery of the notification** to a third party other than the person to whom payments are made is delivery to the creditor or assignee, in the case where the creditor fails to designate an address for sending the notification of rescission. (Emphasis added).

The proposition of traditional agency principles of the common law of England is still in force in America. Under *Erie Railroad Co. v. Tompkins*, 304 U.S. 64 (1938), this Court should accept state common law as authority, and Oregon common law states that notice to agent is notice to principal. The Oregon Supreme Court affirmed that English common law forms a part of Oregon common law, in *Shasta View Irrigation District v. Amoco Chemicals Corporation*, 329 Or. 151, 986 P. 2 2536 (July 29, 1999).See also *Smothers v. Gresham Transfer, Inc.*, 332 Or. 83, P3d 333 (Or. 05/10/2001).

It was not until after three year period of statute of limitations passed that Petitioner became aware of this assignment, due to the errors in that assignment. Respondent's action in the filing of assignment prejudiced the Petitioner. Under equitable tolling and estoppel the Petitioner did provide notice of rescission via her protest of April 22, 2002, of which Respondent Bank One received a copy; and via the lawsuit filed on thereby acquiring subject matter jurisdiction. This Court's review is warranted to resolve the circuit conflict, conflict with Regulation Z and forestall further distortion of the TILA.

V. THE NINTH CIRCUIT ERRED BY NOT ACCEPTING SERVICE OF NOTICE TO RESCIND ACCORDING TO THE POOLING AND SERVICE AGREEMENT.

A. Terms of Pooling Agreement Allow Presentment Of Documents To Master Servicer WMC, Original Creditor.

The issue before this Court is whether written notice to WMC as a Master Servicer of a pooling and service agreement comply as notice to creditor and or assignee under the terms of that agreement and/or under the TILA. The Pooling and Servicing Agreement states:

> The Master Servicer ... upon the discovery by the Seller [WMC], the Master Servicer [WMC], or the Trustee ... or the Company [WMC Secured Assets Corporation] **of a breach of any of the representations and warranties ... which materially and adversely affects the interests of** ... Mortgage Loan, **the party discovering such breach shall give prompt written notice to the**

other parties. [Emphasis added.] (App., 1u).

Names of the parties are located on the first page of the pooling and service agreement (App., 1s). The Pooling and Servicing Agreement, on page 52 (App., 1p), goes on to state:

> "(a) [T]he Master Servicer [WMC] shall take such actions as are necessary to ensure the servicing and administration of the mortgage loans ... Without limiting the generality of the foregoing, the Master Servicer ... is hereby **authorized and empowered by the Trustee to, execute and deliver, on behalf of itself, ... the Trustee or either of them, any instruments of** satisfaction, **cancellation**, partial or full release, discharge **and all other comparable instruments,..**"

(Emphasis added.) Defendants failed to deny the following allegation from the First Amended Complaint (App., 1t):

> ¶ 69. WMC as Master Servicer, as well as any Subservicer, has a duty to deliver to the Trustee any instrument of satisfaction, cancellation and all other comparable instruments with respect to Mortgage Loans under the terms of the Pooling and Servicing Agreement.

The power of the Master Servicer, WMC, is not limited to just servicing of the loan. Respondents make a claim that providing WMC notice of rescission does not constitute notice to the assignee under 15 U.S.C. § 1541 (f)(1) which states: " A servicer of a consumer obligation arising from a consumer credit transaction shall not be treated as an assignee of such obligation for the purpose of this section **unless** the servicer is **or was the**

owner of the obligation." (Emphasis added). Now WMC is Master Servicer under a pooling and service agreement which caused the assignment of deed of trust. WMC, WMC Secured Assets Corporation and the First National Bank of Chicago were all parties in forming the pooling and servicing agreement. FNBC, as Trustee, is the assignee.

The Federal Register, Vol. 65, No. 114, Tuesday, June 13, 2000, page 37174, states:

> E. "Master Servicer" means the entity that is a party to the pooling and servicing agreement relating to trust assets **and is fully responsible for servicing**, directly or through subservicers, the assets of the trust. [Emphasis added]

Now the Petitioner served notice of rescission to WMC, who was the original lender as well as Master Servicer, which is the same as servicer under § 1641 (f)(1), which can be treated as the assignee. According to the terms of the pooling and servicing agreement, the Master Servicer can accept the Petitioners' notice of rescission. Petitioner served notice on August 6, 2001, within the three year period of statute of limitations, for a loan made on August 26, 1998. With notice of rescission being provided within three years, the Petitioner acquired subject matter jurisdiction for her cause of action and should be allowed her remedy. See *A-Z International, id.* This Court's review is warranted to forestall further distortion of the TILA.

B. Oregon Law And Cases In Other Courts Support The Proposition That Notice To Agent Is Notice To Principal.

Oregon law allows for proposition of notice to agent is notice to principal. See *State v. Burss*, 113 Or. App. 494 (1994) (See fn. 3). Cases in other courts support the proposition that

notice to agent is notice to principal. See, for example, *Passmore v. Woodard*, 37 N.C. App. 535, 541, 246 S.E.2d 795, 800 (1975) (notice to agent is notice to principal); see also 58 Am. Jur. 2d Notice 4, at 573 (1989); see also *When is a Principal Charged with an Agent's Knowledge?* 13 Duke J. of Comp. & Int'l L. 291; see also *Bonded Royalties Inc. v. Jefferson*, 1935 OK 846, 50 P.2d 281, 174 Okla. 345:

> ¶21 No principle of law is better settled than that a principal is bound by the knowledge of the agent, or, otherwise stated, notice to the agent constitutes notice to the principal.
>
> ¶22 This rule is so well settled that it needs no citation in support thereof, and we will not prolong this opinion further than to say that this rule is set forth by this court in the case of *Knights & Ladies of Security v. Bell*, 93 Okla. 272, 220 P. 594, in the following words:
>
> "As a general rule, notice to the agent and knowledge obtained by him while acting within the scope of his authority is notice to the principal."

See also 3 W. Fletcher, Cyclopedia of the Law of Private Corporations § 793 (rev. perm. ed. 1994) (notice to agent is imputed to principal "if the matter" about which notice is given "is relevant or pertinent to the subject matter of the agency" or employment); *see also Suburban Motors of Grafton, Inc. v. Forester*, 134 Wis. 2d 183, 192-193, 396 N.W.2d 351, 355 (Ct. App. 1986):

> [C]orporation is charged with constructive knowledge, regardless of its actual knowledge, of all material facts of which its officer or agent

> receives notice or acquires knowledge while acting in the course of his employment within the scope of his authority, even though the officer or agent does not in fact communicate his knowledge to the corporation. [Emphasis added])

(quoting 3 W. Fletcher, Cyclopedia of the Law of Private Corporations § 790 (rev. perm. ed. 1975)).

Subject matter jurisdiction was acquired when notice of rescission was provided to agent WMC. See *A-Z International, id.* This Court should resolve the conflict with Regulation Z and forestall further distortion of the TILA.

CONCLUSION

Finally, Petitioner is not an attorney and is inexperienced in procedure as practiced in the U.S. Supreme Court. If this submission is found wanting in one or more particulars, it is incumbent upon the Court to inform Petitioner of the deficiencies, their specifics and assist the Petitioner in correcting the submission, and the Petitioner hereby respectfully requests such assistance.

The petition for a writ of certiorari should be granted.

Respectfully submitted.

Dianna Roberts*
c/o 17932 N.E. Wasco
Portland, Oregon 97230
(503) 666-9121
*Pro Se